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No. 87-654

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEW ENERGY COMPANY OF INDIANA,
Appellant,

v.

JOANNE LIMBACH, TAX COMMISSIONER OF OHIO,
and SOUTH POINT ETHANOL,
Appellees.

On Appeal from the Supreme Court of Ohio

BRIEF FOR THE STATES OF IDAHO, IOWA, KANSAS AND MINNESOTA AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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BRIEF FOR THE STATES OF IDAHO, IOWA, KANSAS AND MINNESOTA AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

This brief *amici curiae* is jointly filed by the States of Idaho, Iowa, Kansas and Minnesota, sponsored by their respective Attorneys General, pursuant to Rule 36.4 of the Court.

STATEMENT OF INTEREST

The four States that have joined to file this brief have concluded, like the State of Ohio, that the production and use of ethanol as an additive to gasoline is in the public interest. Ethanol, when blended with gasoline, increases the fuel's octane rating, reduces carbon monoxide emissions, and eliminates the atmospheric emissions of lead

associated with lead-based fuel additives. The use of a 90/10 blend of gasoline and ethanol, commonly referred to as "gasohol," thus promotes a cleaner and safer environment. In addition, the use of ethanol as a fuel additive expands agricultural markets in the United States and reduces dependence on foreign oil.

To serve these ends, and to make ethanol commercially viable, the four States that have joined this brief, like more than two dozen others, provide a lower tax rate, a tax exemption or a tax credit against the States' motor vehicle fuel taxes for ethanol that is blended into gasoline.[1] Ohio similarly provides a tax credit for ethanol, and makes that credit available to gasohol that is blended from Ohio-produced ethanol *and* to gasohol that is blended from ethanol produced in other States that also provide a tax credit, exemption or refund for Ohio-produced ethanol. The question presented in this case is whether the reciprocity provision of Ohio Rev. Code § 5735.145(B) violates the Commerce Clause.

Because the four *amici* States share Ohio's public policy of promoting ethanol use, and because these States believe that the Ohio reciprocity provision ably and lawfully serves that goal, the *amici* States have a substantial interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977), the Court noted that its Commerce Clause jurisprudence is dependent on a "case-by-case approach":

> "On various occasions when called upon to make the delicate adjustments between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result

[1] Idaho Code § 63-2405; Iowa Code § 324.21; Kan. Stat. Ann. § 79-3408; Minn. Stat. § 296.02(7).

> turns on the unique characteristics of the statute at issue and the particular circumstances in each case." *Ibid.*

Despite this admonition in favor of careful analysis, appellant New Energy largely ignores "the statute at issue and the particular circumstances in [this] case," and instead bases its argument on what it perceives to be a sweeping and well-established principle against reciprocal legislation. Thus, New Energy contends that "[i]n an unbroken line of decisions, this Court has ruled that mandatory reciprocity laws are facially discriminatory and barred by . . . the Commerce Clause." Appellant's Br. 15. In support of this proposition, New Energy relies on but two decisions—*Great A&P Tea Co. v. Cottrell*, 424 U.S. 366 (1976), and *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). We submit this brief to refute New Energy's reciprocity analysis.

As we show, *Great A&P Tea* and *Sporhase* are not controlling here. Neither case established the sweeping principle that New Energy would find banning all reciprocal legislation. To the contrary, in a variety of contexts, including regulations affecting interstate commerce, this Court has upheld reciprocal legislation by which a State invites the voluntary cooperation of its sister States. *E.g., Bode v. Barrett*, 344 U.S. 583, 586 (1953); *Kane v. New Jersey*, 242 U.S. 160, 167-68 (1916).

Indeed, the reasons underlying the Court's decisions in *Great A&P Tea* and *Sporhase* were not that the statutes in those cases contained reciprocity provisions *per se*, but that those statutes, by operation of their reciprocity clauses, were protectionist measures that threatened a total ban on interstate commerce and did not effectively further legitimate local interests. Those evils, however, are not present here.

Ohio Rev. Code § 5735.145(B) neither prohibits nor discriminates against interstate commerce in ethanol.

By its tax credit, Ohio does not seek to assure that Ohio residents only purchase ethanol that was produced in Ohio; nor does Ohio seek an unfair advantage for Ohio-produced ethanol in interstate markets. To the contrary, the record establishes that the Ohio tax credit (together with federal tax credits directed at the same end) is itself responsible for the existence of a meaningful market for ethanol. And, by encouraging its sister States to enact similar tax credit legislation, Ohio Rev. Code § 5735.145(B) serves to promote further interstate commerce in ethanol, thus advancing both legitimate State interests in increased ethanol use and the promotion of local industry, and the national interest in free trade that is served by the Commerce Clause.

ARGUMENT

I. THE DECISIONS OF THIS COURT DO NOT ANNOUNCE A PROHIBITION AGAINST ALL RECIPROCAL LEGISLATION.

Central to appellant New Energy's argument before this Court is its claim that "mandatory reciprocity provisions are 'facially discriminatory' and are subject to 'the strictest scrutiny.'" Appellant's Br. 18.[2] As a result, New Energy argues, Ohio Rev. Code § 5735.145(B) is almost facially invalid, regardless of its actual effects (or lack of effect) on interstate commerce.

A. In support of its proposition concerning reciprocal legislation, New Energy relies on but two decisions—*Great A&P Tea Co. v. Cottrell*, 424 U.S. 366 (1976), and *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). In each case the Court held invalid under the Commerce Clause a State law that contained a reciprocity provision. Those cases, however, do not support the sweeping proposition that New Energy asserts. And, those cases are not controlling here.

Great A&P Tea struck down a Mississippi statute that allowed milk from another State to be sold in Mississippi only if the other State "accepts Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis." 424 U.S. at 367. In addition to its health-related arguments—which the Court characterized as "border[ing] on the frivolous," *id.* at 375[3]—Mississippi sought to justify its reciprocity requirement as promoting commerce. *Id.* at 378.

The Court rejected Mississippi's argument, but it did not do so on the ground that reciprocity provisions are *per se* unlawful. Instead, the Court expressly "recognized that mutually beneficial objectives may be promoted by voluntary reciprocity agreements." *Id.* at 378. What the Court found objectionable was not that Mississippi's

[2] Although New Energy frequently refers to "mandatory reciprocity," it nowhere explains what it means by that term or the term's significance. If by the term "mandatory reciprocity" New Energy means reciprocal legislation that is enacted by one State without its Sister States' prior agreement to the reciprocal conditions, then the term, and the legal conclusion that New Energy would draw from it, sweep far too broadly. As we show *infra* at 9-11, reciprocal legislation need not be accepted by another State, either before or after its enactment, in order to pass constitutional muster. See *Great A&P Tea Co.*, 424 U.S. at 379 ("we have not held that acceptance of offered reciprocity is required from other States").

On the other hand, if by "mandatory reciprocity" New Energy means reciprocal legislation that, absent acceptance by a sister State, completely prohibits interstate commerce and thus threatens economic isolation, see *id.* at 368, 379, *amici* can understand and accept the term. But, as we show, the reciprocity provision found in Ohio Rev. Code § 5735.145(B)—unlike those in *Great A&P Tea Co.* and in *Sporhase*—cannot properly be characterized as that form of reciprocity and therefore is not impermissible. See *infra* at 12-18.

[3] The Court explained: "[E]ven if Louisiana's standards were lower than Mississippi's, the clause permits Louisiana milk to be admitted to Mississippi if Louisiana enters into a reciprocity agreement. The reciprocity clause thus disserves rather than promotes any higher Mississippi milk quality standards." *Id.* at 375-76.

legislation offered a reciprocal arrangement—an arrangement that Louisiana and other States could accept or refuse—but that Mississippi had "use[d] the threat of economic isolation as a weapon to force sister States to enter into [this] reciprocity agreement." *Id.* at 379. Thus, "the barrier of the reciprocity clause to sales of out-of-state milk in Mississippi . . . 'in practical effect exclude[d] from distribution in [Mississippi] wholesome milk produced . . . in [Louisiana].'" *Id.* at 375 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951)). Such a total bar to interstate commerce was "'precisely the kind of hinderance to the introduction of milk from other States . . . condemned as an "unreasonable clog upon the mobility of commerce."'" *Id.* at 381 (quoting *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 377 (1964)).[4]

[4] The Court also rejected Mississippi's argument that its reciprocity requirement was a valid response to Louisiana's "erect[ing] economic barriers to the sale of Mississippi milk in Louisiana under the guise of health and inspection regulations." *Id.* at 379. The appropriate response, the Court ruled, was not for Mississippi to engage in economic retaliation, but for "Mississippi and its producers [to] pursue their constitutional remedy by suit in state or federal court challenging Louisiana's actions as violative of the Commerce Clause." *Id.* at 380.

New Energy points to this portion of *Great A&P Tea* and suggests that Ohio's only appropriate response to Indiana's enactment of a direct production subsidy for ethanol (which benefits only New Energy) instead of a tax credit "is a lawsuit, not discriminatory legislation." Appellant's Br. 32-33. But, of course, a State's direct subsidy of a local industry, like Indiana's subsidization of New Energy, does not violate the Commerce Clause. See, *e.g.*, *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 95 (1984) (plurality opinion); *id.* at 103 (Rehnquist, J., dissenting). Thus, unlike Mississippi in *Great A&P Tea*, Ohio and South Point Ethanol have not eschewed meritorious litigation against an impermissible State regulation in favor of simple economic retaliation. And, as we show *infra* at 13-15, Ohio's reciprocal tax credit is not discriminatory legislation within the meaning of the Court's Commerce Clause jurisprudence.

In *Sporhase* the Court struck down a Nebraska statute that conditioned withdrawal of local groundwater for transportation across State lines on the destination State's granting reciprocal rights of withdrawal and transportation into Nebraska. The Court acknowledged Nebraska's "unquestionably legitimate and highly important" interest in conserving its groundwater, 458 U.S. at 954, and indicated that substantial licensing restrictions for interstate transportation would be permissible, *id.* at 955-57. Nebraska's additional requirement of reciprocity, however, in conjunction with Colorado's absolute prohibition on exportation of groundwater, "operate[d] as an explicit barrier to commerce between the two States." *Id.* at 957. This explicit barrier to all interstate commerce in groundwater, and not simply the existence of a reciprocity provision *per se*, rendered the Nebraska law unconstitutional. *Id.* at 957-58.

Thus, neither *Great A&P Tea* nor *Sporhase* can properly be read as a sweeping constitutional prohibition of all reciprocal legislation. In each case the effect of the particular reciprocity provision, combined with the specific surrounding circumstances, was to effect a total barrier to interstate commerce. The only logical reasons for Louisiana's particular reciprocity provision in *Great A&P Tea* were to bar Louisiana milk from being sold in Mississippi, or to compel Louisiana to lower its standards for milk imported from Louisiana.[5] Of course, neither

[5] Suppose that Louisiana's Grade A milk standards were more stringent than Mississippi's, so that Louisiana milk satisfied Mississippi's health standards but Mississippi milk did not satisfy Louisiana's. Since Louisiana milk was healthy by Mississippi standards, Mississippi could not properly prohibit the importation of Louisiana milk. Louisiana, however, could properly reject Mississippi milk, which did not meet Louisiana's stricter health standards. The effect of Mississippi's reciprocity requirement, therefore, would be either to compel Louisiana to lower its standards for milk

of these goals was permissible. Similarly, in *Sporhase* the reciprocity provision effectively precluded the exportation of any groundwater from Nebraska to Colorado. Because that total barrier to commerce could not be justified, the Nebraska statute fell under the standard of *Hughes v. Oklahoma*, 441 U.S. 322 (1979). See 458 U.S. at 957-58.

In sum, *Great A&P Tea* and *Sporhase* do not stand for the proposition that reciprocal legislation is unconstitutional *per se*, but only that reciprocal legislation will be struck down where the clear effect of that reciprocity is impermissible under the Commerce Clause.

B. Reciprocal legislation, however, does not necessarily have effects that are impermissible under the Commerce Clause. This conclusion, and the foregoing analysis of *Great A&P Tea* and *Sporhase* as *not* announcing a prohibition of all reciprocal legislation, are confirmed by the Court's decisions that address—and approve—reciprocity statutes. *Great A&P Tea* itself points to two such decisions, citing with approval *Bode v. Barrett*, 344 U.S. 583 (1953), and *Kane v. New Jersey*, 242 U.S. 160 (1916). See 424 U.S. at 378-79.

At issue in *Bode v. Barrett* was a tax that Illinois imposed for the use of its public highways based purely on a vehicle's gross weight. 344 U.S. at 584. The statute required Illinois residents and residents of other States to pay the same tax, but exempted nonresidents from the tax "*provided the states of their residence reciprocate and grant like exemptions to Illinois residents.*" *Id.* at

imported from Mississippi, or to allow Louisiana's producers of admittedly healthy milk to be barred from the Mississippi market.

Alternatively, if Louisiana milk were inferior to Mississippi's, then the reciprocity requirement would allow lower quality milk into Mississippi. If this were the case, the reciprocity provision would disserve rather than promote Mississippi's asserted interest in public health, and therefore could not survive Commerce Clause scrutiny. *See* 424 U.S. at 375-76.

586 (emphasis added). The Court summarily rejected the interstate carriers' challenge to this reciprocity requirement, viewing the permissibility of "that kind of reciprocal arrangement" as settled law. *Ibid.*[6]

One of the decisions to which the *Bode* Court pointed was *Kane v. New Jersey, supra*. *Kane* upheld against challenge under the Commerce Clause and the Fourteenth Amendment a New Jersey law that required nonresidents to pay New Jersey an automobile registration fee if they drove in or through New Jersey. Mr. Kane, a New York resident, challenged the New Jersey statute on the ground that it did *not* contain a reciprocity clause, as did the Maryland law that the Court had upheld the previous year in *Hendrick v. Maryland*, 235 U.S. 610 (1915). There, "[t]he Maryland law contained a reciprocal provision by which nonresidents whose cars are duly registered in their home state are given, for a limited period, free use of the highways in return for similar privileges granted to residents of Maryland." 242 U.S. at 167-68; see 235 U.S. at 620. Such reciprocity provi-

[6] *Bode*'s principal holding, that a State's simple gross vehicle weight tax is valid under the Commerce Clause, is open to question after the Court's decision last Term in *American Trucking Associations v. Scheiner*, 107 S. Ct. 2829 (1987). But *Scheiner* does not cast into doubt the reciprocity portion of the *Bode* decision. Indeed, *Scheiner*'s reliance on the "internal consistency" test as the touchstone for determining the validity of a State tax strongly supports the permissibility of a reciprocity provision like that enacted by Illinois in *Bode*, or by Ohio here. In each case, the State tax, including the reciprocity requirement, is "of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Id.* at 2840 (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)). If each State exempted nonresidents from a gross vehicle weight tax, then there would be no burden on interstate commerce from the States' imposition of such a tax. And, if each State granted a tax credit for ethanol produced in other States, subject to a reciprocity requirement like that in Ohio Rev. Code § 5735.145(B), then ethanol produced in each State would be eligible for a tax credit in all States.

sions, the *Kane* Court observed, had "become common in state legislation." 242 U.S. at 168.

Speaking through Justice Brandeis, the *Kane* Court ruled that this form of reciprocal legislation "is not an essential of valid regulation. Absence of it does not involve discrimination against nonresidents; for any resident similarly situated would be subjected to the same imposition." *Ibid.* Yet it was equally clear that such reciprocal legislation, if enacted, would also satisfy the Commerce Clause. That was the case in *Hendrick v. Maryland*, upon which *Kane v. New Jersey* relied. Indeed, the appellant in *Hendrick* was a resident of the District of Columbia, which did *not* have a reciprocal arrangement on automobile registration fees with Maryland. Nevertheless, the Court in *Hendrick* rejected the argument that Maryland's statute discriminated against residents of the District of Columbia, either as compared to Maryland residents or as compared to residents of other States that did have reciprocal arrangements with Maryland. 235 U.S. at 621.

Plainly, the highway taxes at issue in *Bode* and the automobile registration fees at issue in *Kane* and *Hendrick* presented questions under the Commerce Clause. In *Bode* the Illinois tax arguably burdened interstate carriers more than domestic carriers, and the effect of the reciprocity provision was to tax some interstate carriers but not others. In *Kane* and *Hendrick* the automobile registration fees similarly taxed out-of-state drivers, but only if their States chose to tax New Jersey or Maryland drivers. In each case these fees minimally "burdened" interstate commerce, through the additional costs imposed on interstate travel and the inconvenience imposed on nonresident motorists. But the taxes and fees did *not* "operate as an explicit barrier to commerce" between the States, *Sporhase*, 458 U.S. at 957, and they did *not* "threaten complete isolation as the alternative to acceptance of . . . reciprocity," *Great A&P Tea*, 424 U.S.

at 379. In each case, the State's reciprocal legislation was upheld. And, to our knowledge, these decisions upholding legislation granting exemptions from State fees and taxes to nonresidents who reside in reciprocating States have never been questioned.[7]

New Energy's sweeping assertion, that reciprocity laws are "facially discriminatory" and presumptively invalid under the Commerce Clause, is therefore incorrect. As Professor Michael Smith has described:

> "If these reciprocity requirements are discriminatory on their face, they are an unusual instance of the type. They are not necessarily discriminatory in purpose . . .; a state may enact legislation requiring reciprocity with the genuine intention that other states will satisfy the requirement and thereby elimi-

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[7] Reciprocity provisions such as these, in which a State conditions its grant of a tax exemption or credit on the availability of a similar tax credit or exemption in a sister State, are not uncommon. As the Court has noted, many States require reciprocity before crediting sales tax paid in another State against the home State's use tax. *Williams v. Vermont*, 105 S. Ct. 2465, 2471 (1985). (The Court has expressly reserved the question whether such a credit against a State's use tax is constitutionally required. *Ibid.*)

Moreover, the Court has upheld a variety of interstate agreements affected through reciprocal legislation in other contexts. See *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 469 (1978). For example, in upholding the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings against a Privileges and Immunities Clause challenge, the Court explained:

> "The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. It is not to be construed to limit the variety of arrangements which are possible through voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution." *New York v. O'Neill*, 359 U.S. 1, 6 (1959).

The fact that this Act was adopted as a result of the States' self-interest, "serv[ing] a self-protective function for each of the enacting States," *id.* at 9, did not render the law invalid.

nate the difference in treatment between those outside and inside the state. Moreover, to the extent that this purpose is actually achieved, the requirements are not discriminatory in effect either.

> "In any event, the Supreme Court clearly was right in [*Great A&P Tea*] when it observed that *not all reciprocity requirements are discriminatory.*"

Smith, *State Discriminations Against Interstate Commerce*, 74 Cal. L. Rev. 1203, 1241 (1986) (emphasis added; footnotes omitted).

Accordingly, the Court should not declare Ohio Rev. Code § 5735.145(B) invalid merely because it is a form of reciprocal legislation. Rather, the Court must consider "the unique circumstances of the statute at issue and the particular circumstances" of this case. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 329. As we now show, the Ohio ethanol tax credit validly promotes legitimate State interests and the national interest in commerce among the States.

II. OHIO'S RECIPROCAL TAX CREDIT FOR ETHANOL IS NOT DISCRIMINATORY LEGISLATION. ON THE CONTRARY, THE STATUTE PROMOTES THE NATIONAL INTEREST IN INTERSTATE COMMERCE.

The trial court found that the Ohio General Assembly's purposes in enacting Ohio Rev. Code § 5735.145(B) included "promoting domestic industry," J. St. App. 63a, and promoting "a cleaner and safer environment for Ohio citizens by encouraging the use of ethanol as a replacement for lead in gasoline not only in Ohio but in all states." J.A. 44, J. St. App. 56a; *accord*, J. St. App. 6a. Appellant New Energy does not question that these State interests are in fact served by Ohio's ethanol tax credit, but instead contends that the former purpose is illegitimate, and that Ohio has sought to serve both purposes through a statute that discriminates against interstate

commerce or that excessively burdens that commerce. Neither contention is correct.

A. Although New Energy repeatedly refers to Ohio Rev. Code § 5735.145(B) as "facially discriminatory," it plainly is not discriminatory in either of the senses referred to by Professor Smith or accepted by this Court.

First, Ohio Rev. Code § 5735.145(B) lacks a discriminatory purpose. In contrast to the Mississippi milk statute in *Great A&P Tea*, the Ohio ethanol tax credit demonstrably *is* "legislation requiring reciprocity with the genuine intention that other states will satisfy the requirement." Smith, *supra*, at 1241. South Point Ethanol's general manager testified that South Point's support for the Ohio reciprocity clause in the Ohio General Assembly was based not on a desire to close the Ohio market to out-of-state firms, but "as an incentive to all states to enact legislation that would promote the sale of ethanol in their states." J.A. 139. And, the trial court found as fact that one of the Ohio General Assembly's principal purposes in enacting § 5735.145(B) was "to affect the policies of other states to grant reciprocal tax credits." J. St. App. 63a.[8] Thus, Ohio did not enact its reciprocal ethanol tax credit with the protectionist purpose of closing Ohio's ethanol market to out-of-state producers, but with the hope that Ohio's sister States would also enact, or would maintain, similar tax credits for ethanol.

Second, Ohio Rev. Code § 5735.145(B) has not had a discriminatory effect. A clear majority of States have enacted or have retained a tax credit for ethanol. Among the many States granting ethanol tax credits are Illinois

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[8] As we show *infra* at 16-18, Ohio's legislative purpose of influencing the policies of other States, as applied in this case and effected through § 5735.145(B), is entirely legitimate. *E.g.*, *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 877 n.6 (1985); *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 671 (1981); *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 478 (1978).

and Tennessee. Three major producers from those States —Archer Daniels Midland, Pekin Energy, and A.E. Staley —are eligible for the Ohio tax credit and vigorously compete with South Point Ethanol for ethanol sales in Ohio. The record contains no evidence that Ohio's reciprocal tax credit has had the effect of increasing the share of the Ohio ethanol market that is served by in-state, rather than out-of-state, producers.[9] Indeed, the parties agreed, and the trial court found, that "ADM, Pekin and Staley have the capacity to supply the portion of the Ohio market for ethanol presently being filled by [New Energy]." J.A. 28. Thus, there is no evidence to support a conclusion that Ohio's reciprocal legislation has had a discriminatory effect on interstate commerce.[10]

In sharp contrast to the statutes that the Court has struck down as violative of the Commerce Clause, Ohio's reciprocal ethanol tax credit does not have "the primary effect of prohibiting or discriminatorily burdening a resident's purchase of out-of-state goods or services." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 336. Ohio has not used its taxing power "to assure that residents trade only in intrastate commerce," *id.* at 335, to divert out-of-state business operations to be performed in Ohio, see *id.* at 336, or to gain an unfair advantage for Ohio-produced goods in interstate markets. Ohio Rev. Code § 5735.145(B) therefore is not discriminatory legislation within this Court's Commerce Clause jurisprudence.

[9] Under the Commerce Clause, "[t]he burden to show discrimination rests on the party challenging the validity of the statute." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

[10] *Amici* acknowledge that Ohio's reciprocity statute, in conjunction with Indiana's decision to enact a direct production subsidy (which benefits only New Energy) instead of a generally available tax credit, has disadvantaged New Energy in the Ohio market. New Energy, however, is not barred from competing in the Ohio market, or from benefitting in the Ohio marketplace from any cost advantages it gains from Indiana's direct subsidy. Moreover, it is well-established that the purpose of the Commerce Clause is to protect and promote interstate commerce, not to protect individual companies. "The fact that the burden of the state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Maryland*, 437 U.S. 117, 126 (1978).

B. Although New Energy contends that the Ohio ethanol tax credit burdens interstate commerce, the reality is that the Ohio statute *promotes* interstate commerce in ethanol. As such, the statute advances the national interest in commerce among the States, and can hardly be deemed to disturb the policies underlying the dormant Commerce Clause. The promotion of interstate commerce occurs in two independent fashions.

1. The record is clear and all parties agree that, but for the existence of tax credits, no market for the production and use of ethanol as a gasoline additive would exist. The federal government and various States have enacted credits, exemptions and subsidies to encourage ethanol production and its use as motor fuel. See Appellant's Br. 4-5; J.A. 25-26, 30-31. In fact, New Energy's chief executive officer testified that "[t]he only way we can currently do so [remain competitive with unblended gasoline] is through the state and federal incentives or credits that exist, and *absent those credits and ethanol would not be a viable factor in the market place today.*" J.A. 65 (emphasis added); see also J.A. 18. The parties agreed, and the trial court found, that "[t]he provision of tax credits has been the best method adopted by the federal and state governments to encourage the use of ethanol." J.A. 26.

Thus, far from acting as an *artificial barrier* to interstate commerce in ethanol, Ohio's tax credit is an *artificial incentive* to that commerce. Ohio has created a tax incentive, available to both in-state and out-of-state ethanol, to encourage ethanol's production and use. Without the Ohio credit, a much smaller market would exist

in Ohio for ethanol as a motor fuel, if indeed any market would exist at all.[11]

In these circumstances, it simply makes no sense to refer to Ohio Rev. Code § 5735.145 as a "burden" on interstate commerce. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 807 (1976). Ohio's ethanol tax credit creates no barrier. Instead, the Ohio statute allows for the *expansion* of a market in interstate commerce that might not otherwise exist. That Ohio's reciprocity provision limits the incentive's availability to ethanol that is produced in other States that offer similar incentives does not alter that central fact. See *id.* at 815-17 (Stevens, J., concurring). Whether or not Indiana (or any other particular State) accepts Ohio's offer of reciprocity, there can be no dispute that Ohio's tax credit has created *more* commerce in ethanol, not less.

2. As the trial court found, one of the Ohio General Assembly's principal purposes in enacting its reciprocal

[11] Appellee South Point Ethanol argues that this simple, and undisputed, fact implies that Ohio's amendment of its ethanol tax credit statute to add a reciprocity requirement is not "the kind of action with which the Commerce Clause is concerned." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 805 (1976). Relying on the Court's decision in *Alexandria Scrap*, South Point contends that where the affected commerce does not result from "the natural functioning of the interstate market," but rather is "created in whole or in substantial part," by the challenged State statute, *id.* at 809 n.18, the statute should not be read to give rise to "a burden which the Commerce Clause was intended to make suspect." *Id.* at 807; *accord, id.* at 816 (Stevens, J., concurring) ("[w]hether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce").

The *amici* States agree with South Point's arguments, although we do not restate them at length here. But even if South Point has overstated the case, and Ohio's use of a tax credit to enhance the ethanol market is not immune from review under the Commerce Clause, it is unassailably true that the Ohio tax credit promotes, rather than hinders, interstate commerce.

tax credit was "to affect the policies of other states to grant reciprocal tax credits." J. St. App. 63a. In this fashion, Ohio hoped to enhance the market in other States for ethanol, including ethanol that is produced in Ohio. New Energy acknowledges that this was one of the purposes of Ohio's reciprocal tax credit, but suggests that this State purpose is illegitimate. Appellant's Br. 31-33. Quite the contrary, Ohio's purpose in this regard was entirely legitimate and, in the particular circumstances presented here, furthers the national interest in commerce among the States.

The Court has squarely recognized "that promotion of local industry is a legitimate state interest in the Commerce Clause context." *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 877 n.6 (1985); *accord, e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984). Of course, a State may not seek to promote local industry through protectionist or discriminatory legislation. *E.g.*, *Bacchus Imports*, 468 U.S. at 271; *Boston Stock Exchange*, 429 U.S. at 335-36. But, as we have described *supra* at 13-15, Ohio's reciprocal tax credit is *not* discriminatory legislation within the meaning of the Commerce Clause, either in purpose or effect.

In a pair of cases decided under the Equal Protection Clause—*Metropolitan Life Insurance Co. v. Ward*, *supra*, and *Western & Southern Life Insurance Co. v. Board of Equalization*, 451 U.S. 648 (1981)—the Court has drawn the line between permissible and impermissible promotion of domestic industry. Those cases held valid a State's efforts "to influence the policies of other States in order to enhance its domestic companies' ability to operate interstate," while striking down a State's erection of "barriers to foreign companies who wish to do interstate business in order to improve its domestic [companies'] ability to compete at home." *Metropolitan Life*, 470 U.S. at 877-78.

In short, "[t]here can be no doubt that promotion of domestic industry by deterring barriers to interstate business is a legitimate state purpose." *Western & Southern Life*, 451 U.S. at 671. Nor should there be any doubt that, if a State may lawfully enact reciprocal legislation to *deter* other States from creating *barriers* to interstate commerce (as California did in *Western & Southern Life*), then a State also may lawfully enact reciprocal legislation to *encourage* other States to create *incentives* to interstate commerce. That is precisely what Ohio has done here.

In this case, there was no need for Ohio to deter other States from creating barriers to interstate commerce in ethanol. The price structure of the unsubsidized marketplace was sufficient to preclude any meaningful commerce in ethanol as a gasoline additive without any further State action. Instead, Ohio's effort is to encourage other States to promote the production and use of ethanol through the enactment of tax credits, exemptions, or refunds.[12] Those States that agree with Ohio's policy, and enact or maintain tax incentives for ethanol used as a motor fuel, enhance interstate sales of ethanol, both from Ohio and non-Ohio producers. And, those States that choose not to enact ethanol tax incentives have no less commerce in ethanol than would have existed without Ohio's reciprocal legislation.

In sum, the reciprocity of Ohio Rev. Code § 5735.145(B) creates an incentive for other States to encourage interstate trade in ethanol. In stark contrast to the reciprocity provisions at issue in *Great A&P Tea* and *Sporhase*, Ohio's reciprocal ethanol tax credit thus promotes not only Ohio's legitimate State interests, but also the national interest in commerce among the States.

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[12] The parties agreed, and the trial court found, that "[t]he provision of tax credits has been the best method adopted by the federal and state governments to encourage the use of ethanol." J.A. 26.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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